RECORD AND BRIEFS

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No. 16-712

IN THE

Supreme Court of the United States

OIL STATES ENERGY SERVICES, LLC,
Petitioner,

v.

GREENE'S ENERGY GROUP, LLC, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF BIOTECHNOLOGY INNOVATION ORGANIZATION (BIO) AND ASSOCIATION OF UNIVERSITY TECHNOLOGY MANAGERS (AUTM) AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI

The Biotechnology Innovation Organization ("BIO") is the world's largest biotechnology trade association.[1] It represents over 1,100 companies, research institutions, technology incubators, and similar entities in the medical, agricultural, environmental and industrial biotechnology sectors.

The Association of University Technology Managers ("AUTM") is a nonprofit organization dedicated to bringing research to life by supporting and enhancing the global academic technology transfer profession through education, professional development, partnering, and advocacy. AUTM's more than 3,200 members represent managers of intellectual property from more than 300 universities, research institutions, and teaching hospitals around the world, as well as numerous businesses and government organizations.

BIO and AUTM have an important interest in this case because strong and predictable intellectual property rights are critical to their missions. Biotechnology companies tend to be small. Most are precommercial and do not yet have marketed products. Others derive most of their revenue from one or two products. The companies typically hold a handful of valuable patents protecting their business. The biotechnology sector has the highest percentage of R&D reinvestment of any U.S. industry.

Biotechnology companies and their investors need a strong U.S. patent system with predictable

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

and cost-effective outcomes. They have been harmed by the current system of *inter partes* review ("IPR") under the 2011 America Invents Act ("AIA"), which has proven to be imbalanced, expensive, and lacking in finality to the detriment of patent-holders. Contrary to the express text of the Constitution, the IPR process renders patent rights anything but "secure." It discourages biotechnology companies from making the extensive investments necessary to develop new drugs and other industrial and environmental biotech products.

SUMMARY OF ARGUMENT

I. Patents are property to which private rights attach. Under this Court's jurisprudence, patents have long been treated as conveying private rights, not "public rights." Indeed, it is well-settled that patents are constitutionally protected forms of private property under the Fifth Amendment's Takings Clause.

The Government contends that patents are "quintessential public rights" and compares them to federal employee benefits, veterans' benefits, and Social Security benefits. Opp. Cert. 12. But contrary to the Government's position, the historical treatment of patents shows that they are not analogous to statutory benefits deemed public rights. Treating them as such would devalue patent rights and disrupt well-settled investment-backed expectations. This Court should reaffirm that patent rights are private, not "public rights."

The Government's theory also would undermine the property-based quid pro quo between inventor and society that provides the basis for the patent system. According to the Government, patent rights

are no more vested or secure than statutory benefits that can be altered or revoked altogether. Such a theory is inconsistent with the specific demand of the Constitution and would disrupt the reasonable expectations of the biotechnology industry and many other businesses, academic institutions, and other organizations that have made significant investments in intellectual property in reliance on the premise that patent rights are vested forms of property rather than revocable "public rights" or governmental gratuities. The Government's "public rights" theory is far too sweeping and does not provide an appropriate basis for resolving this case.

II. In the past, this Court has concluded that, in some circumstances, Congress may assign the adjudication of certain private rights to non-Article III tribunals, where the parties have consented to the arrangement, the rights involved have not been specifically provided for in the Constitution, and the administrative tribunals have been confined to narrow jurisdiction and have adopted fair adjudicatory procedures.

The IPR process in the Patent Trial and Appeal Board ("PTAB") has none of those attributes. As currently constituted, the IPR process does not offer a fair and impartial forum for the adjudication of patent rights. The IPR process has been transformed into a "hunting license," allowing anyone (including financial speculators) to force patent-owners to undergo burdensome and expensive defenses of their patents, sometimes over and over again. PTAB judges are Title 5 employees of the executive branch, appointed by the Secretary of Commerce and serving under his "policy direction." These executive branch employees can, and sometimes do, effectively

overturn the results of years of litigation in Article III courts.

The IPR process is also conspicuously different from other proceedings to review patents, such as interference or derivation proceedings. Those proceedings are narrower in scope, have more fairness protections, operate under less prejudicial timelines, often concern another inventor's claim to a patent, and allow for more robust judicial review.

The IPR process is particularly suspect as applied retroactively to patents issued prior to the enactment of the AIA in 2011. Because property rights vest upon the issuance of a patent, Congress cannot undermine or nullify those rights after-the-fact. The current IPR process offers no special safeguards to protect vested rights. Instead, it eliminates statutory and constitutional protections afforded patents in Article III courts, resulting in many cases in the complete destruction of property rights.

III. However it resolves the case, this Court should avoid unnecessarily calling into question adjudication of patent claims in other forums, such as the International Trade Commission.

ARGUMENT

I. PATENTS ARE PRIVATE RIGHTS, AND THE GOVERNMENT'S "PUBLIC RIGHTS" THEORY IS INCORRECT.

The Government argues that patents are "quintessential public rights" and insists that they "confer rights that 'exist only by virtue of statute.'" Opp. Cert. 9 (citation omitted). It compares them to federal employee benefits, veterans' benefits, and

Social Security benefits. *Id.* at 12. Historically, this Court has treated the category of "public-rights" cases as including disputes over customs duties (*Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68 (1982) (plurality opinion)); membership in Indian tribes (*Wallace v. Adams*, 204 U.S. 415, 423-24 (1907)); taxes (*Old Colony Trust Co. v. CIR*, 279 U.S. 716, 723-24 (1929)); and claims against the United States (*Williams v. United States*, 289 U.S. 553, 563-64 (1933)).

But patents are fundamentally different from the examples cited by the Government or treated as "public rights" by this Court. Moreover, the Government's "public rights" theory would breach the bargain between the inventor and society that lies at the foundation of the patent system.

A. This Court Has Historically Treated Patent Rights as Private Rights, Not "Public Rights."

It has been long understood that patents confer traditional property rights on patent owners. "A patent is property." *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 187 (1933). It is freely assignable, *Transparent-Wrap Mach. Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 642 (1947), and is treated "a species of property" "of the same dignity as any other property." *Id.* at 643. *See also Cleveland v. United States*, 531 U.S. 12, 23 (2000) (re-affirming that a patent is protected "property"); *Consolidated Fruit-Jar Co. v. Wright*, 94 U.S. (4 Otto) 92, 96 (1876) ("A patent for an invention is as much property as a patent for land."); *Seymour v. Osborne*, 78 U.S. 516, 533 (1871) ("Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property,

consisting of a franchise, during the term for which the franchise or the exclusive right is granted."); 35 U.S.C. § 261 ("[P]atents shall have the attributes of personal property.").

Indeed, this Court has long held that patents are constitutionally protected forms of *private* property, equivalent to other undisputed forms of property, under the Fifth Amendment's Takings Clause. "A patent confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser." *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2427 (2015) (quoting *James v. Campbell*, 104 U.S. 356, 357-58 (1881)). This Court has opined that it is "long [] settled" that "a patent is property, protected against appropriation both by individuals and by government" under the Takings Clause. *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945). In *Cammeyer v. Newton*, 94 U.S. (4 Otto) 225 (1876), this Court explained that "an invention [secured by a valid letter-patent] is property in the holder of the patent, and . . . is as much entitled to protection as any other property." *Id.* at 234-35 (citations omitted); *see also McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 609 (1898) ("It has become the property of the patentee, and as such is entitled to the same legal protection as other property."). In *Crozier v. Fried, Krupp Aktiengesellschaft*, 224 U.S. 290 (1912), this Court applied to the patent context "the well-established and indeed elementary requirements in favor of property rights essential to be afforded in order to

justify the taking by government of private property for public use." *Id.* at 306.

That patents confer private rights is also reflected in the fact that, historically, patents have enjoyed a presumption of validity and were subject to invalidation only upon a challenger meeting a heightened standard of proof. *Microsoft Corp. v. i4i Ltd.*, 564 U.S. 91, 95 (2011). In *RCA v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1 (1934), this Court explained that a patent's "presumption of validity" is "not to be overthrown except by clear and cogent evidence," *id.* at 2, and "an infringer who assails the validity of a patent . . . bears a heavy burden of persuasion," beyond a "dubious preponderance." *Id.* at 8. As with other important private rights, a patent could be ruled to have improperly issued only upon a showing of clear and convincing evidence. For example, only clear and convincing proof can contest a will, *see, e.g., Lutz v. Orinick*, 401 S.E.2d 464, 467 (W.Va. 1990); reform a deed, *see Thirty and 141, L.P. v. Lowe's Home Centers, Inc.*, 565 F.3d 443, 446 (8th Cir. 2009); or establish adverse possession or a prescriptive easement, *see, e.g., United States v. Tobias*, 899 F.2d 1375, 1378 (4th Cir. 1990); *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 631 n.13 (6th Cir. 2008).

The Government's "public rights" theory is also contrary to the constitutional conception of the nature of the patent property right. In contrast to many Article I powers, which are typically broad and open-ended, the Constitution is much more particular in prescribing the means by which the Congress can promote the progress of science and useful arts: by "securing . . . to . . . Inventors the exclusive Right to their . . . Discoveries." Art. I, § 8, cl. 8. Notably, the

Intellectual Property Clause calls for "*securing* . . . exclusive Rights" – pre-existing rights – rather than creating wholly new rights out of whole cloth or bestowing them as a matter of public largesse. The term "securing" implies the recognition of rights that are not created and conferred by the Government, and it is highly doubtful that "securing" a right entails the power to revoke or invalidate it absent special constitutional protections. *See* Preamble ("We the People of the United States, in Order to [...] *secure* the Blessings of Liberty to ourselves and our Posterity") (emphasis added). Moreover, the Constitution recites the "exclusive Right," not "exclusive Benefit" or "exclusive Privilege."[2]

Under the patent system created by the Framers, the foundation of a patent right is the inventor's sweat and ingenuity. The Government's obligation is to safeguard and perfect pre-existing inchoate property rights earned by the inventor's own efforts, not to diminish them by making them revocable at the Government's discretion. Thus, Chief Justice John Marshall explained that "[t]he constitution and law, taken together, give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent." *Evans v. Jordan*, 8 Fed. Cas. 872, 873 (C.C.D.Va. 1813). An inventor possesses an "inchoate property which [is] vested by the discovery," *id.* at 874, and "perfected by the patent." *Id.* at 873. Justice Story, writing for the Court in *Pennock v. Dialogue*, 27 U.S. 1 (1829), agreed that an inventor had an

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[2] The Constitution recites "Privilege" in several other places, such as "the Privilege of the Writ of Habeas Corpus," and "all Privileges and Immunities of Citizens in the Several States." The "exclusive Right" in Art. I, § 8, cl. 8 is the first and only place where the original Constitution recites a "Right."

"inchoate right" even before filing for a patent. *Id.* at 15-16. This understanding of a patent right is not consistent with the theory that it is merely a "public right."

This principle has long been understood for copyrights, which arise from the very same constitutional Clause as patents. Like the inchoate rights vested in an invention, rights in copyrightable work spring into existence at the moment the work is created, without any requirement to register the work with the Copyright Office. *See* 17 U.S.C. § 408(a).

In his 1792 treatise, Joseph Barnes, one of the early American patent commentators, explained the idea of a patent "securing" a pre-existing right: "[A] system for securing property in the products of genius is a mutual contract between the inventor and the public, in which the inventor agrees, on proviso that the public will *secure* to him *his property* in, and the exclusive use of *his discovery* for a limited time, he will, at the expiration of such time, cede *his right* in the same to the public . . . ."[3] In his equally important American *Commentaries*, Chancellor James Kent classified both copyrights and patents under the heading, "Of original acquisition by intellectual labor."[4] As Daniel Webster declared in the House of Representatives in 1824, "the right of the inventor" is "the fruit of his mind—it belongs to him more than any other property—he does not inherit it—he takes

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[3] Cited in Edward C. Walterscheid, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 143 (2002).

[4] 2 James Kent, COMMENTARIES ON AMERICAN LAW 497 (O.W. Holmes, Jr. ed., 12th ed. 1873) (1826).

it by no man's gift—it peculiarly belongs to him, and he ought to be protected in the enjoyment of it."[5]

This understanding remains true today. "Since 1790, the patent law has operated on the premise that rights in an invention belong to the inventor." *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.*, 131 S.Ct. 2188, 2192 (2011). "[A]n inventor owns 'the product of [his or her] original thought.'" *Id.* at 2195 (citation omitted).

The emphasis on the moral claim of the inventor to the fruits of his or her labor was a uniquely American justification for patents under the Constitution. In *McKeever v. United States*, 14 Ct. Cl. 396 (1878), the Court of Claims compared the British and American schemes, observing that, even in the late nineteenth century, Britain adhered to its traditional view of patents as "a grant" issuing solely from "royal favor," and therefore it "shall not exclude a use[] by the Crown." *Id.* at 420. The *McKeever* Court pointed out the different legal status of patents in the United States, which secured the "property in the mind-work of the inventor." *Id.* at 417-18.

At the time the Constitution was ratified, securing patents as property rights to inventors was alien to foreign patent systems, which had historically viewed patents as special privileges allocated by monarchs in pursuit of their regulatory policies.[6] But the fundamental purpose of the Intellectual Property Clause was to avoid the abusive system of royally-

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[5] 41 ANNALS OF CONG. 934 (1824).

[6] *See* B. Zorina Khan, THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920, at 182 (2005).

granted monopolies that had existed under the British Crown and other European systems.[7] Madison, for example, decried such monopolies as "justly classed among the greatest nuisances in Government."[8] In his influential edition of Blackstone's *Commentaries*, St. George Tucker summarily rejected criticisms of the Constitution that the Intellectual Property Clause permitted the federal government "to establish trading companies."[9] He concluded that "nothing could be more fallacious" because "such monopolies" were "incompatible" with the constitutional provision.[10]

Reclassifying patents as "public rights" would hew back to the 18th century British system of governmental prerogative that the Framers rejected. Patents are fundamentally different from "public rights," and this Court should not accept the Government's invitation to weaken patent rights by treating them as "public rights."

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[7] *See* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1259-76 (2001).

[8] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) in 11 THE PAPERS OF JAMES MADISON 297, 299-300 (Robert A. Rutland et al. eds., 1977).

[9] 1 St. George Tucker, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 266 (1803) (appendix to vol. 1).

[10] *Id.*

B. The Government's "Public Rights" Theory Is Inconsistent With the Quid Pro Quo That Underlies the Patent System.

The Government's "public rights" theory would treat patent rights as no more secure than statutory benefits, subject to alteration or revocation by the legislature or executive branch. Yet patent rights are the result of a fundamental and constitutionally recognized bargain between an inventor and society: the inventor secures a right to exclude for the term of the patent, and society obtains public disclosure of the invention (otherwise held as a trade secret) so that it will be available for use and further innovation. *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) ("The disclosure required by the Patent Act is 'the quid pro quo of the right to exclude.'") (citation omitted). "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

In reliance on the promise of the Intellectual Property Clause, biotechnology companies (and other patent-holders) have invested many billions of dollars in research and development of new technologies that have produced enormous social benefits. Biotechnology companies are an integral part of a number of industrial sectors of high importance to society, including human and animal health care, agricultural products, industrial enzymes, and bio-based products and energy sources.

The ability to develop these technologies depends greatly on the strength and stability of patent rights. Small, emerging companies are at the forefront of the search for new cures and therapies, conducting 70 percent of clinical trials. There are more than 6,000 drug programs attacking 533 unique disease indications.[11]

The innovative medicines produced by this research save and extend lives, improve quality of life, and benefit the healthcare system and society as a whole. For example, cancer patients lived a combined 23 million years longer between 1988 and 2000, thanks to investments in cancer research.[12] New medicines have raised the survival rates for childhood cancer from 58% in 1970 to 83% today and for chronic myeloid leukemia from 20% a decade ago to 80% today. A new generation of Hepatitis C drugs offers cure rates of about 90%, with reduced treatment duration and few side effects.[13] Improvements in HIV/AIDS treatment have turned what was once a "death sentence" into a chronic and manageable disease for millions of people.[14] Biotechnology has longer lead times from invention to market than virtually any other industry. Among the longest time-

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[11] Statistics from online database www.biomedtracker.com/.

[12] Darius N. Lakdawalla et al., *An Economic Evaluation of the War on Cancer*, 29 J. Health Econ 333 (2010).

[13] *Hepatitis C Treatments Give Patients More Options*, U.S. Food & Drug Admin. (July 28, 2014), https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm405642.htm.

[14] Hasina Samji et al., *Closing the Gap: Increases in Life Expectancy Among Treated HIV-Positive Individuals in the United States and Canada*, 8 PLOS ONE e81355 (2013).

to-market technologies are radiopharmaceutical diagnostics (7-9 years), agricultural chemicals (9 years), medical devices (first-in-class) (5-10 years), genetically modified crops (6 to 13 years), in vitro diagnostics based on new diagnostic correlations (7 to 10 years), and pharmaceuticals (12-16 years).[15]

An important aspect of the bargain embodied in the Intellectual Property Clause is that innovators – in addition to shouldering research and development costs – agree to publicly disclose their inventions, in exchange for limited patent protection. An inventor generally has a choice whether to seek patent protection or preserve the invention as a trade secret. Patent-holders have chosen to disclose their inventions publicly, in reliance on the constitutional promise of patent protection.

Treating patents as merely "public rights," whose continued enforceability depends on the sufferance of the legislative and executive branches, would renege on the bargain embodied in the Intellectual Property Clause. After a patentee has publicly disclosed the invention, raised large investments, spent years in product development, assumed the risk of failure, and against all odds achieved success, the Government proposes that it may revoke the underlying patents just as readily as it can reclaim overpaid Social Security benefits. The Government's "public rights" theory would devalue patent rights and risk giving carte blanche to the political branches to regulate patent rights out of existence.

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[15] Benjamin N. Roin, *The Case for Tailoring Patent Awards Based on Time-to-Market*, 61 UCLA L. REV. 672 (2014).

II. THE IPR PROCESS AS ENACTED AND IMPLEMENTED IS CONSTITUTIONALLY INFIRM.

The IPR process as currently constituted lacks the protections and hallmarks of fairness required to justify permitting an executive branch agency to perform the functions of an Article III court in adjudicating private rights. As operated today, the IPR process is not a constitutionally permissible procedure for adjudicating the validity of the hard-earned property rights of inventors.

A. This Court Has Recognized Exceptions To Article III Jurisdiction Only In Limited Circumstances.

In the past, this Court sometimes has approved certain congressional schemes for the resolution of private rights in non-Article III tribunals. In *Crowell v. Benson*, 285 U.S. 22 (1932), for example, this Court approved an administrative scheme for determining maritime employee compensation claims, citing a series of practical considerations in justifying Congress's assignment of private-rights claims to a non-Article III forum. The statute at issue had "a limited application," *id.* at 54, and the commission merely resolved factual issues "in the routine of making compensation awards." The statutory scheme also provided for "the reservation of full authority to the court to deal with matters of law." *Id.*

Similarly, in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), the Court upheld a provision of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") providing for a data-sharing arrangement between pesticide manufacturers, with disputes about compensation

between the companies to be decided by binding arbitration. The Court stressed that pesticide manufacturers (*i.e.*, all of the parties) voluntarily accepted the arbitration regime by choosing to enter into data-sharing arrangements. *Id.* And the Court observed that the parties had affirmatively abandoned any due process challenge to the fairness of the arbitration procedure. *Id.* at 592-93.

Finally, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court upheld a statute empowering the CFTC to entertain state-law counterclaims brought by a broker in response to a customer's CFTC complaint against the broker. The Court focused on "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Id.* at 851. The Court cited a series of practical considerations: (1) the claim and the counterclaim concerned a "single dispute"—the same account balance; (2) the CFTC's assertion of authority involved only "a narrow class of common law claims" in a "particularized area of law"; (3) the area of law in question was governed by "a specific and limited federal regulatory scheme" as to which the agency had "obvious expertise"; (4) the parties had voluntarily chosen to resolve their differences before the CFTC; and (5) CFTC orders were "enforceable only by order of the district court." *Id.*, at 844, 852-55.

In such cases, this Court has looked to the practical operation and substance of such schemes, rather than resting on "mere matters of form." *Crowell*, 285 U.S. at 53. When a scheme operates by consent of the parties, is of limited application, and includes a tribunal whose independence is assured, the Court has exhibited a greater willingness to sustain it. Importantly, such cases have involved

private rights that are not specifically prescribed and secured by the Constitution. Here, all those factors militate against the propriety of the IPR process.

B. IPR Proceedings Conducted By The PTAB Do Not Meet This Court's Criteria For Agency Adjudication of Private Rights.

The existing IPR process cannot survive the approach of *Crowell*, *Schor*, and *Thomas*. Unlike the non-Article III tribunals approved in *Schor* and *Thomas*, IPRs operate without the consent of all parties. *See Schor*, 478 U.S. at 850 ("Schor . . . chose to avail himself of the quicker and less expensive procedure Congress had provided him."); *Thomas*, 473 U.S. at 573-74 (consenting to binding registration as precondition for registering a new pesticide). Nor are IPRs limited to the ministerial calculation of statutorily mandated compensation, such as in the no-fault regime in *Crowell*, 285 U.S. at 41, or the voluntary data sharing in *Thomas*, 473 U.S. at 575.

Compared to the non-Article III tribunals approved by the Court, the PTAB operates much more broadly. It makes findings of fact and conclusions of law and performs statutory interpretation. It can effectively overturn the decisions of Article III courts adjudicating the same matter between the same parties. The IPR process has given rise to the previously unknown phenomenon of "reverse-trolling," in which interlopers, who need not establish standing, threaten patent owners with IPR petitions to extort "settlement" payments or use the IPR process to engage in other financial speculation.

These problems have been particularly troubling for the biotechnology industry, which relies on the

certainty of patent rights when making the vast investments necessary to develop new drugs, therapies, and agricultural products. While any one of the procedural flaws in the IPR process may not be sufficient to render it unconstitutional, when taken together, the failures mean that the IPR process is not constitutionally permissible without significant reforms.

1. The PTAB Operates More Broadly, And With Less Independence, Than the Tribunals Approved By This Court.

Under *Crowell* and its progeny, this Court has approved statutes of "limited application" that deal with "a narrow class of common law claims" in a "particularized area of law." But the PTAB in conducting IPR proceedings operates much more broadly. With over 300 administrative judges hearing thousands of cases involving every industry, the PTAB directly affects a significant portion of the nation's economy. Although the PTAB's jurisdiction over IPRs is limited to challenges based on prior art and obviousness, 35 U.S.C. § 311(b), the PTAB has received over 6,500 IPR petitions since 2012. According to the PTO's budget submission, it expects a record number of cases this year, with the annual number of AIA petitions, the vast majority of which are IPRs, growing to over 3,000 by Fiscal Year 2021.[16]

The issues decided by the PTAB are complex and resemble inquiries typically undertaken by Article III

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[16] U.S. Patent & Trademark Office, *Fiscal Year 2017 Congressional Justification* 62 (Feb. 9, 2016), https://www.uspto.gov/sites/default/files/documents/fy17pbr.pdf.

courts. Questions surrounding patent validity are nothing like the calculation of damages at issue in *Crowell*. The PTAB in an IPR proceeding does nearly all the things that a district judge does in assessing the validity of a patent, including claim construction, weighing fact and expert discovery, accrediting and discrediting testimony, statutory interpretation, and application of case law. The primary difference is that, unlike in district court where patents are presumed valid, the PTAB applies different claim construction and burden of proof standards that are more favorable to the petitioner, with limited opportunity for discovery.

Moreover, the right at risk is one of constitutionally-recognized property, rather than a right purely created by Congress. By contrast, the adjudication processes in cases like *Thomas* and *Schor* were "method[s] for protection of the right [Congress] created" (*Thomas*, 473 U.S. at 588). The parties in such cases faced the loss merely of financial compensation, which was statutorily created and applicable to persons who voluntarily availed themselves of the benefits of those agencies, including the alternative dispute procedures at issue in those cases. The PTAB is entirely different.

Nor does the PTAB, as part of the executive branch, carry the hallmarks of independence that the Court has recognized as an important aspect of appropriate non-Article III tribunals. In *Schor*, the Court emphasized the litigants' "right to have claims decided before judges who are free from potential domination by other branches of government," 478 U.S. at 848, and cited approvingly a statement that Article III "was designed as a protection for the parties from the risk of legislative or executive pressure on judicial decision." *Id.* (citation omitted).

The CFTC met this test, because it was an "independent agency," *id.* at 836, and "was relatively immune from political pressures." *Id.* at 855. In *Thomas*, the Court noted that the private arbitration at issue in that case "surely does not diminish the likelihood of impartial decisionmaking, free from political influence." 473 U.S. at 590; *see also Stern v. Marshall*, 564 U.S. 462, 489 n.6 (2011) ("[T]he agency in *Crowell* functioned as a true 'adjunct' of the District Court. That is not the case here.").

The PTO is not an independent agency. It is part of the Commerce Department and exercises its authorities "subject to the policy direction of the Secretary of Commerce." 35 U.S.C. § 1. By law, administrative patent judges comprising the PTAB "shall be appointed by the Secretary." 35 U.S.C. § 6. The Director of the PTO "may be removed from office by the President," 35 U.S.C. § 3, and, of course, the same is true of the Secretary of Commerce, 15 U.S.C. § 1501.

The law authorizes the Director to "designate" administrative patent judges to serve on panels with at least three members, 35 U.S.C. § 6, and the PTO admits that it has manipulated this power to secure its desired policy outcome in some cases. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, No. 2016-2321, 2017 WL 3597455, at *6 (Fed. Cir. Aug. 22, 2017) (Dyk, J., concurring). In several instances, when a PTAB panel has issued a decision contrary to the PTO's policy preferences, the Acting Chief Judge, on behalf of the Director, has granted rehearing and added to the panel judges whose views on the issue are known and more in line with those of the agency. The PTO has acknowledged this practice, agreeing in a Federal Circuit oral argument that it had "engaged the power to reconfigure the panel so as

to get the result you want."[17] The PTO responds to these concerns by saying that it "is not directing individual judges to decide cases in a certain way." *Nidec*, 2017 WL 3597455, at *6 (quoting the PTO's brief in that case). But manipulating panel assignments to achieve specific outcomes has the same effect, and the message is surely not lost on the judges. In this setting, litigants cannot be sure that decisions are made "free from political influence." *Thomas*, 473 U.S. at 590; *see also Nidec*, 2017 WL 3597455, at *6 ("[W]e question whether the practice of expanding panels where the PTO is dissatisfied with a panel's earlier decision is the appropriate mechanism of achieving the desired uniformity.").

Further, the decision whether to institute an IPR – perhaps the most consequential aspect of the process, because of the extremely high success rates of instituted challenges – is vested in the politically appointed Director. 35 U.S.C. § 314. That decision is "final and nonappealable." *Id.* The statute provides no additional independence or protection to administrative patent judges, beyond that afforded to other federal employees. 35 U.S.C. § 3(c) ("Officers and employees of the Office shall be subject to the provisions of title 5, relating to Federal employees.").

The IPR process thus is not "free from potential domination" by the executive branch – it *is* the executive branch. Administrative patent judges do not operate "free from political influence," as this Court's cases require. *Thomas*, 473 U.S. at 590.

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[17] *Yissum Res. Dev. Co. v. Sony Corp.*, No. 2015-1342 (Fed. Cir.), audio at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2015-1342.mp3 (47:20-47:34).

2. *The PTAB Has Failed To Adopt Fair Procedures To Secure Patent Rights.*

The PTAB applies completely different standards of proof from the district court, making conflicting decisions inevitable. Unlike district courts, the PTAB applies a lower burden of proof, no presumption of validity, and a claim construction standard that is more amenable to patent invalidation. At oral argument in *Cuozzo Speed Techs., LLC v. Lee*, No. 15-446, members of the Court expressed unease with this approach, with the Chief Justice stating that "it's a very extraordinary animal in legal culture to have two different proceedings addressing the same question that lead to different results." Tr. at 32. The Chief Justice correctly observed that this is "a bizarre way to . . . decide a legal question." Tr. at 41.[18]

Even if a federal district court upholds a patent's validity, and that decision has been affirmed by the Federal Circuit, the PTAB may nevertheless analyze the same evidence and determine the patent to be invalid. The PTAB gives no precedential weight to the decisions of Article III courts that have examined

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[18] The PTAB has relied on these differing standards to invalidate patent claims after a district court previously found them not proven invalid. In *In re Lunareye, Inc.*, for example, the PTAB justified its decision to adopt a different claim construction for a claim term previously construed by a district court on the basis that the district court's standards "do not apply to the Board for claim construction under the broadest reasonable interpretation in an obviousness review." Corrected Brief for PTO as Intervenor at 38, No. 2016-1413, -1837 (Fed. Cir. Dec. 19, 2016), ECF No. 57. The PTO further argued that because "[t]he crux of the claim construction dispute" was not factual, there were no district court fact findings to which the PTAB "might owe deference." *Id.* at 39.

the identical legal issue. *Novartis AG v. Noven Pharms., Inc.*, 853 F.3d 1289, 1294 (Fed. Cir. 2017) (prior judicial decisions "did not bind the PTAB"). Hence, even if a party pursues litigation in federal court and wins, nothing prevents the PTAB from reaching a different result and effectively overturning the judicial decision.

The fear of conflicting results is not hypothetical. In one case, the Federal Circuit first affirmed a district court decision upholding the validity of the patent, *Novartis Pharm. Corp. v. Watson Labs., Inc.*, 611 Fed. Appx. 988 (Fed. Cir. 2015) (*Novartis I*), and later affirmed an IPR decision *in*validating the same patent on the same grounds. *Novartis AG v. Noven Pharms., Inc.*, 853 F.3d 1289, 1294 (Fed. Cir. 2017) (*Novartis II*). Although one panel of that court has acknowledged that the PTO "ideally should not arrive at a different conclusion" from an Article III court analyzing the same arguments, *In re Baxter Int'l, Inc.*, 678 F.3d 1357, 1365 (Fed. Cir. 2012), a more recent decision has made clear that "the PTAB properly may reach a different conclusion based on the same evidence." *Novartis II*, 853 F.3d at 1294. With no evident regret, the court affirmed the invalidity of the very patent whose validity it had previously upheld.

Such intrusion into judicial power is itself a serious separation-of-powers concern. This Court has made clear that Congress may not vest a "prototypical exercise of judicial power" in a non-Article III tribunal. *Stern*, 564 U.S. at 494 (2011). But Congress's delegation of power to invalidate patents through the IPR process does just that, by allowing the PTAB to nullify the decisions of Article III courts.

Moreover, unlike other non-Article III adjudications that take effect only with judicial approval, the IPR procedure requires no judicial action to invalidate a patent. In *Schor*, the Court emphasized that "CFTC orders, like those of the agency in *Crowell*, but unlike those of the bankruptcy courts under the 1978 Act, are enforceable only by order of the district court." 478 U.S. at 853. If the PTAB issues a final written decision invalidating a patent, however, then the Director of the PTO must invalidate the patent as soon as the time for appeal has expired. 35 U.S.C. § 318(b). No action of the judicial branch is required for the decision to take effect. Thus, the PTAB's invalidation of a patent has the same character and effect as an exercise of judicial power reserved for Article III courts.

Statistics confirm that the IPR process invalidates patents at a much higher rate than district courts. Given the different standards that apply in the two proceedings, this is to be expected. More troubling is that very few patents seem to emerge unscathed from the IPR process. According to recent data published by the PTO, it has instituted a review for 69% of the petitions for which it has made an institution decision.[19] (Approximately 14.5% of petitions filed are settled before a decision is made whether to institute an IPR.) In cases that reach a final written decision, only 18% confirm the validity of the challenged claims and patent. A healthy majority – 65% – result in the complete invalidation of the challenged patent claims, while another 17% result in the invalidation of some of the challenged claims.

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[19] USPTO, *PTAB Trial Statistics*, https://www.uspto.gov/sites/default/files/documents/trial_statistics_june2017.pdf.

These statistics stand in stark contrast to outcomes in the district courts, which confirm the validity of patents about 70% of the time.[20] When the analysis is confined to the challenges based on prior art and obviousness, the grounds available in an IPR, only 14.2% of district court summary judgment motions were successful on those issues. In other words, Article III judges uphold the novelty and non-obviousness of the invention 85% of the time, while the administrative judges at the patent office conclude the opposite in most cases. Although the stated goal of the Act was to provide a "quick and cost effective alternative[] to litigation," H.R. Rep. No. 112-98 at 48, Congress has effectively replaced a judicial forum with an administrative forum that reaches the opposite result in many cases.

Moreover, even if a patent holder prevails in an IPR, it cannot rest. The statutory estoppel provisions for IPR proceedings have not proven adequate to avoid severe prejudice to patent owners. Even when the PTAB confirms the validity of a patent, any person other than the original petitioner may seek an IPR of the same patent on the same grounds. 35 U.S.C. § 315(e). And even if multiple IPR challenges fail, another party may be waiting in the wings to seek invalidation of the patent in a district court, where the favorable decision of the IPR will not have any preclusive effect. *See* 35 U.S.C. § 315(e)(2). Nothing prevents these parties from working together to coordinate an effective assault on a patent in multiple forums. The lack of a standing requirement ensures that patent owners may never be secure in their rights. But the review works only one way: if

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[20] John R. Allison et al., *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 1785 (2014).

the PTAB invalidates a patent, that decision is final, subject only to review in the Federal Circuit, 35 U.S.C. § 141, which has summarily affirmed most cases.[21]

This Court's precedents have recognized the importance of *de novo* review of the legal decisions of administrative tribunals. *See Crowell*, 285 U.S. at 54; *Schor*, 478 U.S. at 853. Although nominally subject to *de novo* review in the Federal Circuit, the PTAB's legal conclusions only rarely receive a searching review in an Article III court, with most appeals from the PTAB resolved by decisions consisting of a single word: "Affirmed."

The fairness problems with the IPR are so glaring that even the PTO's recently-departed Deputy Director has acknowledged that "many inventors have been subjected to abusive IPR trial practice."[22] This concession is particularly noteworthy, because, by law, the Deputy Director of the PTO is a member of the PTAB. 35 U.S.C. § 6(a). An abusive forum is no substitute for the adjudication of private rights in Article III courts.

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[21] According to the most recent available data, since 2012, the Federal Circuit's decisions in over 75% of appeals arising from the PTO have been nonprecedential; more than half have been summary affirmances. Jason Rantanen, *Data on Federal Circuit Decisions – Updated*, https://patentlyo.com/patent/2017/08/federal-circuit-decisions-updated.html (numerical data received from author).

[22] Russell Slifer, "Weakened Patent System Causes U.S. to Slip as a Global Leader of IP Protection," The Hill (Aug. 4, 2017), https://goo.gl/Mte2Pk.

3. The PTAB Is Susceptible To "Reverse-Trolling."

The IPR process also gives rise to an extortionate strategy known as "reverse trolling." When a patent is particularly valuable, or is an especially important asset to a firm, some speculators see an opportunity for easy money and threaten to file a petition for an IPR.[23] If the patentee pays up, the petition will not be filed; if the patentee refuses, its valuable asset will be subject to a review that usually results in at least partial invalidation. Many patentees, aware of the PTAB's invalidation rates, feel compelled to settle these claims, notwithstanding their strong belief that the underlying patents remain valid. And because the AIA has no standing requirement, these threats may be issued by anyone at any time for any reason.

Another reverse-trolling scheme begins with a hedge fund taking a short position in the stock of a company. Having established a short position, the hedge fund then publicly files an IPR petition against the company's key patent. Because most IPRs result in the invalidity of the patent, the company's stock may fall precipitously as a result of the filing of the petition. The hedge fund is able to earn a substantial profit on its short position. The profits are immediate, and the hedge fund need not even go forward with the IPR.[24] The lack of a standing requirement thus

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[23] Lorelei Laird, Patent Holders Allege Financial Companies are Misusing New Post-Grant Review Process for Profit, ABA Journal (Dec. 1, 2015), http://www.abajournal.com/magazine/article/patent_holders_allege_financial_companies_are_misusing_new_post_grant_revie/.

[24] *See* Joseph Walker and Rob Copeland, *New Hedge Fund Strategy: Dispute the Patent, Short the Stock*, Wall St. J. (Apr. 7, 2015), http://www.wsj.com/articles/hedge-fund-manager-kyle-bass-challenges-jazz-pharmaceuticals-patent-1428417408.

provides numerous opportunities for rent-seeking, arbitrage, and "reverse trolling." The end result is that patent owners are threatened with the very abuses that the AIA was enacted to remedy.

4. The Contrast With Other PTO Procedures For Reviewing Issued Patents Shows That The IPR Process Does Not Operate In A Fair Or Valid Manner.

The PTO has several other procedures for reassessing its patent issuance decisions. First, reissue under 35 U.S.C. § 251 is conducted only at the request of the patentee, to correct errors that may have rendered the original patent invalid. This process involves amendment of the patent and the same safeguards and appeal rights that apply to original examination.

Although largely untested to date, derivation proceedings under 35 U.S.C. § 135 resemble pre-AIA interference proceedings and focus on the narrow question of which inventor should have the exclusive right. Importantly, derivation decisions can be appealed to an Article III district court to adduce additional evidence and conduct a new trial. 35 U.S.C. § 146. In each case, these proceedings allow for full and fair development of disputed issues.

Further, the PTO has statutory authority to re-examine patents *ex parte*. 35 U.S.C. § 302.[25] Unlike

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[25] This Court has never ruled on the constitutionality of the PTO's *ex parte* reexamination procedure. The Federal Circuit's decision in *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985), was based in part on the erroneous supposition that patents are public rights. As explained in Section I, patents convey private rights. To the extent that *ex*

the IPR process, the PTO's *ex parte* reexaminations proceed on limited forms of evidence and do not operate as a *de facto* replacement of an Article III court. And because the proceedings are not adversarial, there is no requirement to find for one party over the other. Moreover, the PTO often permits claim amendments in *ex parte* reexaminations; historically, 67% of reexaminations end in the amendment and clarification of the claims.[26]

Finally, supplemental examination under 35 U.S.C. § 257, can only be requested by the patentee and, if granted, results in a reexamination. This process allows the patentee to correct errors in the patent and like reexamination includes similar appeal rights and safeguards.

Compared to these alternative procedures, whose constitutionality is not at issue here, the IPR system combines fewer procedural safeguards with broader scope, fewer appeal rights, and more limited judicial review.

In creating the IPR system, Congress failed to consider far less invasive procedural devices, which would have stood on firmer constitutional ground.

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parte reexamination is constitutional, it is because it carries more of the hallmarks of administrative proceedings this Court has deemed permissible for the adjudication of private rights.

[26] USPTO, Ex Parte Reexamination Filing Data 2 (Sept. 30, 2016), https://www.uspto.gov/sites/default/files/documents/ex_parte_historical_stats_roll_up.pdf. In contrast, as of April 2016, of 118 motions to amend in IPR proceedings, only two were granted as to all new claims and four granted in part as to some claims. USPTO, *Patent Trial and Appeal Board Motion to Amend Study*, https://www.uspto.gov/sites/default/files/documents/2016-04-30%20PTAB%20MTA%20study.pdf.

For example, Congress could have created new examination procedures, such as requiring the patent office to consider more thoroughly evidence, materials or comments provided by third parties before a patent is granted. In fact, the same evidence and arguments that today are presented during an IPR proceeding could also be readily presented during the patent examination stage, thereby avoiding the constitutional question presented here.

C. The IPR System Is Especially Troubling As Applied To Patents Issued Before The AIA.

The IPR system is especially problematic as applied retroactively to patents that issued prior to the AIA's enactment, because such retroactive application upends the patent bargain and settled expectations of patent holders. *See General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness . . ., because it can deprive citizens of legitimate expectations and upset settled transactions."). "Where rights secured under the laws vest, they are protected from subsequent attempts by government to retroactively undo the law and legal expectations that secured those rights." Randolph J. May & Seth L. Cooper, *The Constitutional Foundations of Intellectual Property* 131 (2015). The patent statutes "specify the terms by which . . . inventors secure rights to the proceeds of their . . . inventions." *Id.* at 132. At the time that pre-AIA inventors entered into the quid pro quo for their patents, they held a reasonable investment-backed expectation — based upon the Patent Act itself — that the validity of their patents, if adjudicated, would be challenged in an Article III court with the

commensurate procedural protections of such a venue.

A patent vests at the time of issuance and carries the interests and rights then in effect. This Court has made clear that statutory enactments or repeals after a patent has issued "can have no effect to impair the right of property then existing in a patentee." *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843). Although Congress has broad powers under the Intellectual Property Clause, subsequent statutory changes may "not take away the rights of property in existing patents." *Id.* In this sense, a patent is exactly like real property obtained from the public under a statute or treaty. *Id.*

This principle is squarely applicable to IPRs, because the patent right includes not only the potential breadth of claims and duration of the right, but also the statutory protections and enforcement mechanisms available to protect the patent right.[27] Thus, in *Richmond Screw Anchor Co., Inc. v. United States*, 275 U.S. 331 (1928), this Court opined that a 1918 statute should not be construed as retroactively immunizing a federal contractor (a private party) for infringing a previously issued patent relating to shipbuilding. Even though the statute did not expressly negate a patent, this Court recognized that

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[27] Nor should patent applications that were filed and published before the enactment of the AIA (and subsequently issued as patents) be subjected to the retroactive application of the IPR process. The PTO is required to publish pending patent applications eighteen months after filing. 35 U.S.C. § 122(b)(1). Upon publication, all inventions disclosed in a patent application are committed to the public, eliminating any trade secret rights. Thus, although the inventor does not yet possess an issued patent at the time of publication, society has already received the benefit of the bargain—public disclosure.

the effect of the law was "to deprive [the patent owner] of the cause of action against the infringing contractor for injury by his infringement." *Id.* at 345. This Court refused to approve "an attempt to take away from a private citizen his lawful claim for damage to his property by another private person." *Id.* Such a result, the Court opined, "would seem to raise a serious question as to the constitutionality of the act of 1918 under the Fifth Amendment to the Federal Constitution." *Id.* In short, the protections and enforcement mechanisms are fundamental to the scope and value of the patent right.

Notably, prior to the AIA, statutory changes that could diminish patent rights were intentionally prospective. *See, e.g.*, Act of March 2, 1861, Ch. 88, § 16, 12 Stat. 246, 249 (shortening patent term from 21 to 17 years only for "patents hereafter granted"); Pub. L. No. 103-465, § 534 (preserving longer terms of issued patents). During the enactment of the AIA, members of Congress expressed concern about the constitutionality of retroactive administrative adjudication of vested patent rights. *See, e.g.*, 157 Cong. Rec. H4428 (daily ed. June 22, 2011) (statement of Rep. Manzullo) (objecting to "post-grant administrative review [that] would apply retroactively to already existing patents" because "[g]overnment abrogation of patent rights represents a 'taking' of property"); *id.* at H4421 (statement of Rep. Kaptur) ("A patent should be challenged in court, not in the U.S. Patent Office.").

III. THE EXISTENCE OF OTHER NON-ARTICLE III FORUMS IS NOT RELEVANT TO THE DISPOSITION OF THIS CASE.

That other non-Article III forums adjudicate patent validity issues should have no impact on this Court's decision. As noted in Section II, the PTO has reviewed its patent issuance decisions through various mechanisms distinct from the IPR process. Outside the PTO context, both the Court of Federal Claims and the International Trade Commission ("ITC") have adjudicated patent validity for many years without raising the structural and fairness concerns inherent in IPRs. The Court's decision in this case should not disturb those well-established proceedings.

Although not an Article III court, the Court of Federal Claims has jurisdiction over claims against the United States and its contractors for patent infringement. 28 U.S.C. § 1498(a). This jurisdiction is entirely consistent with that court's jurisdiction over other monetary claims against the United States, and the government's waiver of sovereign immunity for those claims. 28 U.S.C. § 1491.

The adjudication of patent validity by the Court of Federal Claims does not raise the same problems as the IPR process. First, the patentee himself places the validity of the patent in issue by filing suit and patent validity is merely an issue incidental to the primary function of the tribunal. Second, although judges on the Court of Federal Claims are not Article III judges, by law they enjoy fixed tenure and salary protections. 28 U.S.C. § 172. Third, the procedural unfairness of the IPR is not present in this litigation, which applies essentially the same standards for assessing patent validity as a federal district court.

Lemelson v. United States, 752 F.2d 1538, 1548 (Fed. Cir. 1985). The Court of Federal Claims thus does not raise the same concerns as the IPR process before the PTO.

Similarly, the jurisdiction of the ITC to issue an order banning the importation of infringing materials is entirely consistent with Article III and the Seventh Amendment. Congress has given the ITC the authority to make findings that the importation of certain articles "infringe[s] a valid and enforceable United States patent." 19 U.S.C. § 1337(a)(1)(B)(i). During an adjudication, the Commission may consider "[a]ll legal and equitable defenses," including a defense that the underlying patent is invalid. *Id.* § 1337(c).

But the ITC lacks the most troubling attributes of the PTAB, and its adjudications more closely resemble those approved by the Court in *Crowell* and *Schor*. As with the Court of Federal Claims, the patentee itself voluntarily puts its patent at issue in any ITC proceeding. Further, the ITC's jurisdiction is limited to whether to preclude the importation of certain materials, and its adjudication of the validity of the patent is merely ancillary to the exercise of that jurisdiction. In stark contrast to the PTAB, the ITC's findings regarding validity do not have preclusive effect on the decisions of Article III courts. *See Texas Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1569 (Fed. Cir. 1996). In *Texas Instruments*, the Federal Circuit observed that a contrary rule "would potentially deprive the parties of their Seventh Amendment right to a jury trial on the issue of infringement." *Id.* n.10. Unlike the PTAB, the ITC is an independent agency, 19 U.S.C. § 1330, and its adjudications are conducted "in conformity with the provisions of" the Administrative Procedure

Act. 19 U.S.C. § 1337. The Commission applies the presumption of validity and the other safeguards of Article III litigation. The ITC's review of patent validity thus bears no resemblance to the IPR process.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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